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Supreme Court of the United States

OCTOBER TERM, 1967

No. 961

WILLIAM HETTLEMAN, PALMER D. EDMUNDS, and J. EDWARD JONES,

Appellants,

vs.

CHICAGO LAW INSTITUTE, ET AL.,

Appellees.

On Appeal From The Supreme Court Of Illinois.

JURISDICTIONAL STATEMENT.

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First District, entered September 20, 1966, and February 20, 1967, respectively, denying William Hettleman and Palmer D. Edmunds a timely appeal as of constitutional right to that court, and their subsequent timely petition to that court for leave to appeal to it, respectively, from the judgment entered July 13, 1966, aforesaid; and from an order of the Supreme Court of Illinois denying their motion to reconsider that court's order denying a timely petition for leave to appeal from the Illinois Appellate Court to the Supreme Court of Illinois.

OPINIONS BELOW.

The only opinion rendered in both appeals was that of the trial judge, Donald J. O'Brien, filed in 65 CH 6863 on July 11, 1966. It appears in full on pages 137-139 of the printed Abstract, hereinafter referred to as Abs. (Document No. 2, Index of Documents Transmitted to this Court by the Clerk of the Supreme Court of Illinois in Case No. 40603). A copy of O'Brien, J.'s opinion and of the final orders of the Supreme Court of Illinois, dated June 20, 1967 and September 14, 1967, are attached hereto as Appendix A, B and C.

JURISDICTION.

There were drawn in question in the trial court, in the intermediate appellate, and in the state's highest, court, the validity of the 1963 amendment to the Law Libraries Act of 1961, Ill. Rev. Stat. of 1965, ch. 81, sec. 81, (Appendix F-3) and the implementary ordinances of Cook County passed on December 11, 1962, September 30, 1963, June 17, 1965, and November 23, 1965 (Appendix F-2, 4, 5, 6) which, on their face and as they have been sought to be applied to the appellants, and others similarly situated, were asked to be adjudged unconstitutional, void and of no effect.

Notices of Appeal to this Court were duly filed in the Supreme Court of Illinois by Hettleman and Edmunds on September 15, 1967, and by Jones on November 7, 1967.

Jurisdiction of the Supreme Court of the United States to review is conferred by Title 28, U.S.C., § 1257(2).

The jurisdiction of this Court is fully sustained by *The Trustees of Dartmouth College* v. *Woodward, 4 Wheat.* 518, 655. The facts in the case at bar parallel closely those in the *Dartmouth College* case whose principles are controlling and foreclosed the filing of the suit (65 CH 6863) in the Circuit Court of Cook County, Illinois.

STATUTES INVOLVED.

(See Appendix F).

QUESTIONS PRESENTED.

The following questions are presented by this appeal:

A. Whether the 1963 amendment to the Laws of 1961, page 473, sec. 1, 1965 Ill. Rev. Stats., ch. 81, sec. 81, by House Bill 1199 (The Final Synopses and Digest of the 73d Ill. Gen. Assembly to June 30, 1963, page 754) on its face, and as it has been sought to be applied in this case, is unconstitutional, in that it is repugnant to the Constitution of the United States of America in the following respects:

1. By violating the contract clause of Article I, sec. 10, of the U. S. Constitution, and, through it, the Fourth, Fifth, and Fourteenth Amendments thereto, in abridging the constitutionally protected personal and property rights and franchises of The Chicago Law Institute, and its members, under the special charter granted them by the Illinois General Assembly, on February 18, 1857:

a) By infringing the contract entered into, on February 18, 1857, between The Chicago Law Institute and its members, and the State of Illinois by amending and altering their said special charter without the consent of said corporation, and its members;

b) By infringing the contract entered into, on February 18, 1857, between The Chicago Law Institute and its members, and the State of Illinois by amending and altering their said special charter without the consent of said corporation, and its members, conceding *arguendo* it was created for educational and charitable purposes and objects, by transferring its assets to another charitable entity, *arguendo* the Cook County Law Library Advisory Board, and to a

quasi-municipality, the County of Cook, Illinois, without the consent of said corporation, and its members;

c) By infringing the contract entered into, on February 18, 1857, between The Chicago Law Institute and its members, and the State of Illinois in that said 1963 amendment to the Laws of 1961, page 473, sec. 1, 1965 Ill. Rev. Stats., ch. 81, sec. 81, has, in effect, sought to dissolve said corporation without its consent or that of its members, or the institution of a suit by the Illinois Attorney General to dissolve it for misuser or nonuser;

d) By infringing the contract entered into, on February 18, 1857, between the Chicago Law Institute, and its members, and the State of Illinois by transferring the control and management of the affairs of said corporation, without its and their authority, from its 6 officers and 9 member Board of Managers, constituting its 15 man Executive Committee, to the County of Cook and its 9 appointees to a Cook County Library Advisory Board;

e) By infringing the contract entered into, on February 18, 1857, between the Chicago Law Institute, and its members, and the State of Illinois, by depriving and divesting the members of said corporation of their franchise to vote, elect officers and Board of Managers thereof, and to participate in the affairs of said corporation, without its or their consent, thus depriving them of their personal and property rights without due process of law.

B. Whether the implementary Ordinance of Cook County, Illinois, adopted November 23, 1965, on its face, and as it has been sought to be applied in this case, is unconstitutional, in that it is repugnant to the Constitution of the United States of America in the following respects:

1. By violating the contract clause of Article I, Sec. 10, of the United States Constitution, and, through it,

the Fourth, Fifth, and Fourteenth Amendments thereto, in abridging the constitutionally protected personal and property rights and franchises of the Chicago Law Institute, and its members, in and to a certain contract, the 11th decennial lease, entered into by and between The Chicago Law Institute and the Board of Commissioners of Cook County, a political subdivision of the State of Illinois, on March 11, 1958, which does not expire by its terms before April 4, 1968:

a) By infringing the decennial, bilateral contract entered into between The Chicago Law Institute and the County of Cook on March 11, 1958, by becoming a party to a conspiracy to the filing of the unwarranted and unauthorized suit at bar to take the assets, including the unique and valuable 150,000 volume collection of law books, of The Chicago Law Institute, for a public use without any compensation therefor, and dispossessing and ousting the said corporation, and its members, from its said leased premises, and depriving its members of their liberty of ingress to and egress from the said leased premises, and the use thereof as their workshop, from August 12, 1966 to April 4, 1968;

b) By infringing the decennial, bilateral contract entered into between The Chicago Law Institute and the County of Cook on March 11, 1958, after the latter's adoption of an Ordinance, on December 11, 1962, in which Cook County reaffirmed the decennial, bilateral contract, executed March 11, 1958, and its intent to abide by it till its expiration, should the members of The Chicago Law Institute refuse to accept its request that they "donate" the Institute's library to Cook County, and after the almost unanimous refusal of the members attending a special meeting, on June 18, 1965, to accept the Institute Board's recommendations thereat to "donate" all its

assets to Cook County, to dissolve the corporation, and to permit the use of its name to file a suit in chancery to get court sanction to all these proceedings, in that it conspired with unfaithful members of the Institute's Board to appropriate the corporation's assets, including its 150,000 volumes of law books, for a public use without any compensation whatsoever therefor.

2. By violating the Fourth, Fifth and Fourteenth Amendments of the United States of America in engaging in a secret conspiracy to seize and appropriate the property of the Chicago Law Institute for a public use without any compensation therefor, in case the Institute members did not voluntarily "donate" its library to Cook County, as requested in the insinuating Ordinance of December 11, 1962,

a) By adopting an Ordinance, on June 17, 1963, appointing 9 lawyers, 2 of whom were appointed by the judges of the Circuit Court of Cook County who had been appointed by Cook County to the Judicial Advisory Council of Cook County, and 6 of whom had been recommended by the Institute's Board from its own, and not from the entire, membership, contrary to its Ordinance of December 11, 1962, well knowing that, unless the membership, at its special meeting, ratified the selection of these 6 men to the Cook County Library Advisory Board or their appointment was disclosed thereat, neither of which occurred at the special meeting on June 18, 1965, or ever, they would be guilty of a conflict of interest and breaches of fiduciary duty, as actually occurred when 2 of its said Board member appointees, Allman and Cecchini, at the Institute's Board meeting, on November 12 or 19, 1965, voted with 2 other non-appointed Institute Board members, Schrader and Tappy, against 3 non-appointed Institute Board members, Canady, Luken and Zillman, to authorize the Institute's presi-

dent to execute a "donative" contract with Cook County, which contract, in turn, authorized the institution of the suit at bar, and was but a recast of the almost unanimously defeated recommendations voted upon (600 vs. 13) at the members' special meeting on June 18, 1965;

b) By adopting an Ordinance on November 23, 1965, well-knowing the foregoing facts, authorizing President Simon of the County Board to execute the so-called "donative" contract with the pretended Chicago Law Institute on December 6, 1965, just four days before the suit at bar was filed on December 10, 1965.

C. Other Questions:

1. Whether there has been a denial of procedural due process of law by violating the Fifth and Fourteenth Amendments to the Constitution of the United States of America in the proceedings of the case at bar in the court below:

a) By the trial judge denying a petition for a change of venue from him which alleged, supported by official documentation, that, from 1957 until the fall, 1964 (when he was elected a judge of The Circuit Court of Cook County and assigned to Chancery), he was a member of the Illinois Senate; that he was senate appointee to the Illinois Judicial Advisory Council which maintained nexus with the Cook County Advisory Council, composed of Cook County Circuit Judges appointed thereto by the Board of Commissioners of Cook County, who were active in seeking acquisition of The Chicago Law Institute for a proposed Civic Center to house the courts; that he was for many years, prior to 1963, the minority *floor leader* and the spokesman for the Mayor of Chicago who, as was well known to him, was also desirous, as Chairman of the Public Buildings Commission

charged with building the Civic Center, of acquiring The Chicago Law Institute Library to adorn it and for other reasons; that, at the behest of his political patron, he introduced House Bill 1199 to bring Cook County within the County Libraries Act, on June 19, 1963, and sponsored it, successfully, as a step in the conspiracy to appropriate, if necessary, private property for a public use without any compensation therefor;

b) By the trial court entertaining jurisdiction when, on the face of the complaint, it was clear the plaintiffs lacked capacity to sue, conceding *arguendo* their conclusory allegations that The Chicago Law Institute was a public corporation, inasmuch as it has been the law in England, and in the United States, from the earliest times, that the State, as *parens patriae,* alone can file a *contested* suit to invoke equity's power *cy pres,* and control the litigation, where it is *alleged* "the assets of the Institute will be *wholly* lost and dissipated;"

c) By the trial court, lacking jurisdiction over the subject matter, entering a decree;

d) By the trial court's failure to dismiss the complaint;

e) By the trial court refusing to permit appellant Hettleman to file his counteraffidavit in opposition to the plaintiff's motion for summary judgment, as permitted him by the clear, unequivocal and unambiguous Illinois Civil Practice Act, Section 57(3);

f) By the trial court's grant of a motion for summary judgment for the application of equity's power *cy pres,* although the Black et. al. Answer and counteraffidavit, and that of appellant Hettleman, which the trial court refused improperly to file, contain multitudinous material, triable, facts, especially those relating to the conspiracy between the County of Cook and certain unfaithful members of the Institute's

Board to take the 150,000 volume unique law library and assets of the Institute for a public use without any compensation, in violation of the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States of America;

g) By the grant of plaintiffs' motions to dismiss the perfected Notices of Appeal of the appellants Hettleman and Edmunds, and Jones, on the feigned issue of non-compliance with Rule 35 to bar ultimate review by this Court of the many federal questions involved in the case at bar, which resulted in the affirmance of the trial court's decree of July 13, 1966 without appellants' opportunity to be heard fully in the Illinois appellate courts.

STATEMENT OF THE CASE.

The Court's indulgence is prayed if the Jurisdictional Statement may be longer than generally desired, since a clear understanding of this case requires recital of numerous conspiratorial events that led up to the suit at bar; the complex operational facts; the number of dramatis personae; the three records to which reference must be made in tracing how the constitutional questions were raised at three court levels; and the unique substantial federal questions raised having urgent national importance. The format in *Baggett et al.* v. *Bullitt* (October Term, 1963, Appeal No. 220) was followed in some respects.

In 1837, the great Mr. Chief Justice John Marshall had barely breathed his last. The controversial Taney had succeeded him the year before, after rejection as an Associate Justice. Martin Van Buren was President. A half century later, Melville W. Fuller, who had served on the Board of Managers of The Chicago Law Institute in 1872-73, was its First Vice-president, and its President, in the years 1873-75, became Chief Justice of this Court. Illinois acquired statehood in 1818. The County of Cook was formed in 1833. The Village of Chicago had just become incorporated as a City.

By 1837, 19 lawyers had come to Chicago. Law books were few and costly. They formed The Law Institute, a sort of cooperative non-profit association, to exchange the *use* of their books. By 1857, about 60 lawyers had settled in Chicago. Most of them had been trained at the New

York, Virginia, Maryland Bars and at the Harvard Law School, where they had come under the spell of the great authority of his day on the law of trusts, Mr. Justice Story, and Simon Greenleaf, his disciple. (Doc. No. 6 in No. 40603, Hettleman and Edmunds' Supplemental Petition for Leave to Appeal, Exh. A, transmitted to this Court by the Illinois Supreme Court Clerk). These lawyers had been trained to abhor the Statute of Charitable Uses (43 Eliz. c. 4) which they well knew had been either repealed after the American Revolution, or had never become part of the common law, in quite a number of states. They knew well the story of how Henry VIII seized private property (including the libraries, of the Catholic monasteries) under the royal prerogative and sign manual.

When it then became evident that they needed a central location for their books and workshop, they did not create a trust; they obtained a special charter, on February 18, 1857, from the State of Illinois to perpetuate, in corporate form, their primary object: an adequate working law library by which to make a living. They prefixed "Chicago" to their old name. They assigned title to their law books, theretofore retained in themselves, to the Corporation. They received its transferable stock, an aliquot part of the library (Abs. 12, sec. 3) in payment (Jones' R. 40788. Perficient co-founder Elliott Anthony letter, dated January 28, 1897, to Merritt Starr, then the Institute's president).

To disabuse the Internal Revenue that the Corporation was formed for profit, section 2 of its charter was amended in 1907 (Abs. 16), declarative of its character, from its inception, as a private, non-profit professional membership service corporation (Jones' R. 40788, pages 72-73,

transmitted by the Clerk of the Illinois Supreme Court to this Court, Reports of Institute presidents Hacker for 1906 and Paine for 1907). That aliquot interest was, thereupon, called a certificate of membership, but the incidents of ownership (the right to sell, buy, bequeath, or freedom from execution of that interest, Abs. 15, sec. 2), was never diminished. To make this clear, the 1907 amendment reaffirmed the private character of the corporation. It was to continue "to be conducted, maintained, and carried on by the *members* of said corporation" (no visitatorial powers by any public body). Sec. 2 of the *By-Laws* was amended (Abs. 18) to also reaffirm the private corporation: "All certificates for shares . . . shall be taken and considered to be certificates of membership . . . *as provided by the Charter.*"

The thousands of certificates issued since the 1907 amendment to sec. 2 of the Institute's charter still certify *ownership of a share* in the Institute (Jones R. 40788, p. 177; Doc. No. 6, in No. 40603, Hettleman and Edmunds' Supplemental Petition for Leave to Appeal, Exhs. C, C1, C2, Transmitted to this Court by the Illinois Supreme Court Clerk).

The April 20, 1907 amendment to sec. 2 of the Institute charter was made *expressly* in accordance with the Laws of Illinois (Abst. 16). Those laws (Appendix F-1. Full analysis of them was made in Document No. 3, Record of the Illinois Appellate Court. Transmitted to this Court by the Clerk of the Illinois Supreme Court in No. 40603, Petition for Leave to File a Notice of Appeal Under C.P.A., § 76(1) and Illinois Supreme Court Rule 29) state specifically that an amendment of the objects in an existing special charter shall not change the powers, right or privileges thereunder!

Judge Anthony's account of the corporate foundation was confirmed in an article which appeared in the newspaper, *The Chicago Times*, of December 23, 1861, just 106 years ago. In 1963, Cook County Judges Cornelius J. Harrington, Charles S. Dougherty, Samuel B. Epstein and Harold G. Ward made a Report to the Illinois Judicial Conference Executive Committee on the "deal" for Cook County's acquisition of the private Institute Library. They quoted from that *Chicago Times* article (Abs. 65-66), but omitted the following significant, and damaging, statement therein: (Doc. 6, Record in 40603, Hettleman and Edmunds' Supplemental Petition for Leave to Appeal, Exhibit "B"):

> "All the members are stockholders, and thus have a personal, as well as a pecuniary, interest in the prosperity of the enterprise."

The charter, in the light of background factors, contains all the attributes of a private corporation. The perficient founders, "associates and successors", were vested with all the powers, privileges and immunities to carry into effect the purposes of its creation (Abs. 12, Sec. 1). They had the power to sell the library, if necessary or desirable (Abs. 12, secs. 1 and 3), and reinvest the proceeds to support many functions in the law, including legal publications, or law lectures, etc., such as now being given yearly by the Northwestern University Law School in honor of Julius Rosenthal, the Institute's devoted librarian for 36 years—1867-1903.

Appellees make much of section 2 of the charter: A law library was created; ergo, it is an educational institution, though no compliance with Illinois statutes under which those qualified by curriculum, staff, facilities may

incorporate as an educational institution was ever shown. Since "education" of orphans and poor children is used in the Statute of Charitable Uses, 43 Eliz. c. 4, the Institute is "charitable". Hence, equity *cy pres* applies to it. As used in 1857, sec. 2 was meant to provide a law library workshop, for the mutual benefit of its members, as does the laboratory for the physicist and the chemist, in which the lawyer-member could have the tools to improve his skill in serving his clients and to earn his fees. Appellees recognized this was still the Institute library's primary purpose and object in 1965 (Abs. 110, in No. 40603, Answer to question 2 by the plaintiffs' attorney stated, *ante litem motam,* that the cost of membership was deductible from income taxes, as loss, since the lawyers used the library in their business).

The original of every phrase of the objects in § 2 of the charter was traced thoroughly (Doc. No. 1, pages 51-54, Petition for Leave to Appeal in No. 40603 to the Illinois Supreme Court. Transmitted by its Clerk to this Court) to prove that the perficient founders had not in mind, in 1857, the appellees' 1965 construction of those phrases: to dedicate themselves to the dreamy object of promoting the happiness and welfare of mankind. Those were hard times, just preceding the Civil War. Chicago was a poor, pioneer, small city which had experienced devastating epidemics a few years before. Lawyers were struggling for survival. Uppermost in their minds was how to best equip themselves with law books needed badly in the harsh struggle.

The Institute did not get organized till the fall, 1858, as appears from that *Chicago Times* article. Sec. 6 of the Charter (Abs. 13) contained the Institute's part of the

bilateral lease agreement until the Court Clerk made available space in the County Court House in the fall, 1858, to complete the Cook County's part of the bilateral lease agreement. It was then incorporated and integrated as a whole in the first decennial bilateral lease (Abs. 70-74; By-laws, sec. 20, Abs. 34). The arrangement was so satisfactory to Cook County that it has required since then that the Institute covenant "to remain in said County Building".

This happy and mutually beneficial relationship between the parties became uneasy when newspaper stories began to appear, late in 1961, that a Civic Center was being planned to which the courts would be removed across the street from the County Building. The 11th decennial lease had been signed about 3½ years before, in 1958. It had over 6 years to run. Institute representatives asked Judge Harrington, close to the mayor, whether the Institute's lease was to be continued in the Civic Center. Construction thereon was to start in 1963. Completion was expected in 1965. The reply was to pay a cash rental of $8.26 per square foot; to remove elsewhere; or to "donate" the Institute Library to Cook County to be placed in the Civic Center. They then asked Judge Epstein if the Institute would be permitted to complete its lease in the old quarters. The answer was a decisive negative, although he was told that the asked Civic Center rental was prohibitive (Vol. II in No. 40603, transmitted to this Court by the Illinois Supreme Court and Clerk, contains minutes of meetings by dates. See those of December 15, 1961 and January 12, 1962).

Faced with the dilemma of either donating this magnificent and very valuable law library to Cook County or

having its lease terminated upon completion of the Civic Center (Abs. 87, Vol. II, Minutes of December 15, 1961; Abs. 88, Vol. II, Minutes of January 12, 1962; Abs. 88-89, Minutes of January 26, 1962; Abs. 89, Minutes of March 16, 1962), and thoroughly discouraged by the constant rebuffs of the City and County officials and the ultimatum of the "Give us your library or else", the Institute representatives turned to the local federal judges (Abs. 91, Minutes of October 4, 1962; Abs. 92, Minutes of November 16, 1962).

As the result of the first meeting with them, on September 27, 1962, attended by Judges Hoffman, Castle, Campbell and Robson, a tentative deal was agreed upon. Their offer, open till December 1, 1962, was subject to acceptance by the Institute membership and the Federal Courts' Library Committee. Later letters from Judges Castle and Robson made the extended offer subject also to Cook County's right of first refusal. If Cook County refused, assurance was given that the United States Government would accept or confirm. Communication was then had with Daniel P. Coman, the assistant to Seymour Simon, president of the Board of Commissioners of Cook County, Illinois.

On November 30, 1962, President Simon wrote a letter (Abs. 93, Minutes of December 4, 1962) making a proposal which he urged be submitted promptly to the Institute members for acceptance, copies of the letter going to the Mayor and Judge Harrington, among several others. This letter is referred to in Appendix F-2.

An adjourned meeting of the Institute's Board on December 4, 1962 (faced with the deadline set by the Federal Judges and the said Simon letter of November 30,

1962) decided to call a special meeting of the members on December 20, 1962 to then submit both propositions to them for decision. Soon as Judge Harrington and others heard of this (doubtless fearful that the membership, upon learning of the fact of the ultimatum, would favor the U. S. Government offer), they hastened to forestall the projected December 20, 1962 members' special meeting, by arranging a luncheon meeting with Institute representatives for December 10, 1962 at the Mid-Day Club. (Abs. 93-94, Minutes of Meeting December 7, 1962 in Vol. II in 40603). An Institute Board meeting was called promptly for December 7, 1962, which rescinded the call for the members' special meeting.

An agreement was reached to close the deal with Cook County, at that luncheon meeting. The Institute members were never told of the vote to call them into special meeting or its rescission. On December 11, 1962, the next day, Cook County passed the Ordinance, Appendix F-2 (Abs. 94, Vol. II, Minutes of December 14, 1962). The deal was that the Institute Board would try to persuade the members to accept the December 11, 1962 Cook County Ordinance, while Cook County agreed not to disturb the peaceable possession by the Institute and its members until the lease expired on April 4, 1968, if the members did not accept. A letter was, thereupon, transmitted to Federal Judge Robson that, since the Institute would be unmolested in its present quarters, the Institute Board felt the Institute should stay where it was. No mention was made therein that a gentlemen's agreement had been reached to push the Cook County deal. In the course of this litigation, when the 1963 Report of Judges Harrington et al. (page 14 of this Statement) came to light (Abs. 67-68), the prime movers, conspiring allegedly with Cook County,

denied that the donative deal on December 10, 1962 at the Mid-Day Club, was made, as alleged by the Judges (Abs. 103, Exh. E, p. 5, attached to Daly Affidavit, Pres. Schrader report for 1963, in No. 40603). No explanation was ever made why the alleged misrepresentation by the judges was never called to their attention. The prime movers had admitted at depositions that they never did so notify the judges.

Ben Liss was on the Institute Board in 1961, having become an Institute member in 1956, and became the Institute president for 1964. At the December 4, 1962 Institute Board meeting, at which it was voted to call a special meeting of the members for December 20, 1962 to let them decide then what to do, Liss began to sing dissolution. He continued it at the December 7, 1962 Board meeting at which the call for special meeting of the members was rescinded. He confided thereat that he had gone so far, on his own, to talk to an Assistant Illinois Attorney General about filing a suit for dissolution, in order to protect the Board members, against which was never disclosed (Abs. 93, Vol. II, Minutes of Board Meeting December 7, 1962). The seminal idea of invoking *cy pres* to close up the Law Institute germinated into the suit at bar.

About 1 year later, on December 11, 1963, Liss wrote a very strange letter (Abs. 95, Vol. II, Minutes of Board Meeting, December 13, 1963) to President Schrader and John W. Daly, a fellow Institute Board member. He proposed that, at the forthcoming annual meeting of the members to be held on January 31, 1964, there be submitted a plan of liquidation and distribution which should include giving the library "presumably" to Cook County

and filing suit to approve "the liquidation and distribution under the *cy pres* doctrine." He had already set the legal machinery in motion to accomplish his ends, concluding with

> *"We can be assured of every cooperation by the courts and by the Attorney General,* and *I feel certain that our recommendations to the court would be approved by it and the Attorney General."* (italics supplied)

President Schrader replied, disapproving submitting any liquidation plan at the forthcoming annual meeting, and concluded:

> "I believe that fairness demands that the membership be informed of the contemplated future of their Institute."

Daly was really shocked. He wrote a 2 page rebuking letter in which he wrote:

> "I see no reason to consider the bringing of any action under the *cy pres* doctrine as, *in my opinion, such doctrine does not apply to the Law Institute.* * * * I am opposed to having any of our Board members conferring with the Attorney General, or other law agencies, or Courts regarding the business of The Chicago Law Institute, unless and until authority to do so is obtained from the Board of Managers of the Institute, or the membership generally after proper meeting had." (italics supplied)

On December 31, 1962, the Institute had $32,000 cash, $61,000 securities, and a small current liabilities only (Abs. 103, Exh. D, pages 11-13, in Record No. 40603, Vol. II, page 75). On December 31, 1963, the Institute's financial condition was still strong, with about $23,000 cash and about $61,000 in marketable securities (Abs. 103, Vol. II, p. 76). Although the Board's efforts ceased to in-

crease the membership as useless, the cash and securities positions remained unchanged, at the end of the calendar year 1964 (Abs. 103, Vol. II, p. 77), and remained so during 1965 when the suit at bar was filed on December 10, 1965.

While Liss and other members of the Institute's Board were boring from within, Cook County was at it from without. Jones' Affidavit to his Petition for a Change of Venue from Donald J. O'Brien, J. (Jones 40788, pp. 27-34) recites the nexus between him, as the Illinois Senate appointee from 1957-1964 (when he was elected a judge of the Circuit Court of Cook County) on the Illinois Judicial Advisory Council, and the Cook County Judiciary Advisory Council, on which were Judges Harrington and Dougherty by appointment of the Board of Commissioners of Cook County, in exchanges of reports dealing with proposed legislation about matters touching the courts.

On May 5, 1961, the Illinois General Assembly approved House Bill 434 which provided that Illinois counties with 500,000 population or less could create free, public law libraries. Senator O'Brien voted for that Bill. The Illinois Supreme Court then created an Executive Committee which, in turn, recommended to that Court that it appoint a Committee on Courthouse and Jury Facilities. In 1963, that Court appointed on that Committee four judges from Cook County: Cornelius J. Harrington, Chairman, Charles S. Dougherty, Samuel B. Epstein, and Harold G. Ward. That Committee's 1963 Report (referred to on pages 14, 17 of this Statement and at Abs. 62-69) stated (Abst. 65-68):

> "The other item in our report is concerned with the acquisition by Cook County, for the court building (Civic Center), of probably the *most* valuable and

complete law library in the world (showing the judges' ignorance of the law libraries at Harvard, Yale, Columbia, or excessive joy at Judge Harrington's victorious ultimatum to give the library to Cook County or move). . . .

"Some of you know that the Chicago Law Institute is a *private* bar association consisting of approximately 1500 members who have purchased memberships *and who support the library by annual assessments*. . . . (par. 8, Exh. C, Abs. 42 admits this).

"During the planning of the new courthouse . . . Mayor Daley, having in mind the *public law libraries* existing downstate, pursuant to statute, Ill. Rev. Stat. (1961) c. 81, § 81, insisted that the law library in the new building must be open to all members of the bar and *not restricted to a private membership*. . . .

"On May 8, 1963, (sic), House Bill 1199 was introduced amending the Act in relation to the establishment of county law libraries to make it apply to Cook County." (emphasis supplied).

Donald J. O'Brien, Mayor Daley's Senate spokesman and floor leader, well knowing that the gentlemen's agreement, made on December 10, 1962 at the Mid-Day Club meeting which Judge Harrington attended, had never been submitted to the Institute's members (as Cook County itself had theretofore urged until the sneak deal was closed at the Mid-Day Club without the knowledge also of the local federal judges) and well knowing of the objective to be attained, on June 19, 1963 introduced House Bill No. 1199 to amend the 1961 Law Library Act. On June 20, he moved for its second reading. On July 15, 1963, he moved for the third reading and voted "Yea".

Meanwhile, the Institute's members were kept in the dark of what was going on back-stage.

At the Institute Board meeting on April 9, 1965, Liss' notes of a March 19, 1965 meeting of himself, John W. Daly and Leo J. Powers with Daniel P. Coman, assistant to Cook County Board President Simon, was submitted. Vol. II, Meeting of April 9, 1965, Abs. 96-97, contains an illegible, blurred copy, inserted by the plaintiffs in support of their motion for summary judgment. A close inspection with a magnifying glass indicates Daly stated that some members were against the gift to Cook County which would, hence, require submitting any proposal to the membership; that he doubted *cy pres* were applicable. Liss harped on the need for a law suit to protect the directors for what might be illegal action, apparently, to which "Coman suggested that we should consider acting first (seizing the library under *cy pres*), and then letting the objectors take the initiative."

An Institute resolution was then passed, at its April 9, 1965 Board meeting, to file suit under *cy pres* for approval of the gift to Cook County of *all* the Institute's assets, which went beyond even what Cook County's ordinance of December 11, 1962 (F-2) asked. A special meeting of the members was then voted for June 18, 1965 for them to approve the gift, filing the suit at bar at the Institute's expense, and to dissolve the corporation. A call, under date of June 1, 1965, over the signature of Leo J. Powers, president, was then mailed (Abs. 98, Vol. II, Special Meeting, June 18, 1965 Minutes).

The said June 1, 1965 letter stated:

> *"The Chicago Law Institute, as a corporation, is governed and controlled insofar as any distribution of its assets is concerned upon liquidation, by the Illinois Statute regulating 'Not for Profit Corporations'*

and, accordingly, no distribution of its assets may be made to its members. . . . the most appropriate donee of the library collection *and its other assets is the County of Cook* and its new public law library.

. . .

". . . *it is the intention* of the Board of Managers *to submit the above plan to an appropriate Chancery Court for approval.*" (italics supplied)

The deliberate misstatements of fact and law so shocked appellant Hettleman that he formed a Committee for the Preservation of Private Control of the Chicago Law Institute and drafted a reply to the Powers' letter (Jones R. 40788, pp. 179-183). Therein the cited 1944 General Not-for-Profit Corporation Act was shown to be inapplicable, since it had never been accepted by the Institute, a condition precedent to its applicability. The plaintiffs' attorney had to admit this (Abs. 111-112, Question 3, and reply thereto). Even O'Brien, J. had to so find in his opinion (Abs. 138, top; Appendix A of this Statement, bottom of first page). This undermined the foundation of the argument that members in the Institute had no distributive rights, upon dissolution. The only corporation act in force in 1907 (Appendix F-1) provided expressly for such distributive right.

More seriously, and corroborative of the defence of conspiracy, the Committee for the Preservation of the Private Control of the Institute reply stated (what was not disclosed to the members in the call of June 1, 1965 and what was not denied at the special members' June 18, 1965 meeting) that Liss had in his file a letter, received several weeks before his meeting with Coman on March 19, 1965, from the Illinois Attorney General stating, in reply to the inquiry if the Institute ever had

accepted to come under the 1944 General Not-for-Profit Corporation Act, that there was no record of such acceptance.

To ascertain the truth of the a' priori Powers' statement, in his June 1, 1965 call, that the Institute could not continue to operate financially (when was never stated), since members would no longer pay their assessments if they could use a free, public law library, there was attached to that Committee's reply a letter of intent. The member could sign if he would prefer to continue to pay the same annual assessments. The members replied overwhelmingly they wanted no part of a public law library even if it were free. The Amended Complaint ignored this independent canvass (Abs. 4, par. 5) which the Institute's Board should have itself made but didn't. The Powers' call, moreover, did not take into account that Cook County had only a "paper" library which it would take years to build to anything like the Institute library. It took the Institute almost 100 years and an estimated $5,000,000 to buy the law books and periodicals, for overhead in shelving, and paying help to service members.

Was there force, therefore, to the Institute's Board's argument that the Institute could not withstand immediate competition from a free, public law library?

A form designating appellant Hettleman as proxy was also enclosed (Jones R. No. 40788, p. 180). At the June 18, 1965 special meeting, a total of 600 members approximately voted the complete rejection and repudiation of the Board. There were only 13 votes, those of the Board, in favor of its recommendations!

Although Cook County had, on June 17, 1965 (Jones' R. 40788, p. 148, Appendix F-5) the day before the special

meeting, passed its Ordinance appointing to the Cook County Library Advisory Board 6 members of the Institute's Board, the oral statement by John W. Daly in behalf of the Board's recommendations, at the special meeting the following day, June 18, 1965, made no mention of it. At its meeting on April 9, 1965, the Institute Board selected from among themselves only those to be on the Cook County Library Advisory Board, and did not select a representative group from among the members, to be voted on by the members, as was contemplated by the Cook County Resolution of December 11, 1962. *Allman* and *Cecchini* were among the six, and also John W. Daly, as president, Leo J. Powers and Ben Liss (Appendix F-5).

The plaintiffs' attorney was retained following the June 18, 1965 members' special meeting and was fully advised (Abs. 104).

Soon after this attorney's reply, the Institute Board held a meeting, on November 12, 1965 (Vol. II; Abs. 100-101). The plaintiffs, (Vol. II in support of their motion for summary judgment) did not properly present the November 12, 1965 minutes which are crucial. The proper presentation is in Jones' R. No. 40788, pp. 119 ff., from which the following facts appear:

The signatories were *Thomas F. Allman, Joseph R. Cecchini,* Eugene A. Tappy, William H. Schrader, Martin G. Luken, Jr., C. C. Zillman, Jr., and Raymond Canady, and John W. Daly, who served as Chairman. The minutes read:

> "Mr. John W. Daly presented for the President, Mr. Leo J. Powers, a copy of an agreement between the Chicago Law Institute and the County of Cook. A copy of the agreement follows:"

A purported tentative draft of that agreement was supposed to be submitted by the President in person, but neither he nor the draft admittedly ever showed up at the meeting. Mr. Daly sketched, in a general way, its tenor. He then requested a vote to authorize the President to execute it in behalf of the Institute. Messrs. Canady, Luken and Zillman protested that the contract itself was not before them; had not been submitted in advance of the meeting for independent study and analysis; and that they would not, consequently, expose themselves to liability. They, accordingly, voted against the Resolution. Messrs. Allman, Cecchini, Schrader and Tappy voted for it. Secretary Coghlan certified that the agreement voted on was at the meeting, *Allman and Cecchini were at the time also agents and servants of Cook County, under their appointment, by its Ordinance on June 17, 1965,* (Appendix F-5) *to the Cook County Library Advisory Board.* On November 17, 1965, Powers sent a letter (Abs. 100, Vol. II, Minutes of November 12, 1965 Meeting) to each of the Institute Board members who had been present at the November 12, 1965 meeting, attaching a copy of a draft agreement, but, not having been present thereat, misstated that Messrs. Luken, Zillman and Canady had given approval, subject to disapproval upon getting an actual copy of the contract. Zillman, on December 1, 1965, and Luken, on December 2, 1965, wrote letters to Powers (Abs. 101, Vol. II, Minutes of December 17, 1965 Meeting) protesting vehemently the distortion in the Powers' letter of November 17th, and questioned the Institute Board's right to file suit without authority of the members, after the overwhelming defeat on June 18, 1965.

Had Allman and Cecchini disqualified themselves at the November 12, 1965 meeting for conflict of interest, the

vote would have stood 2 in favor (of authorizing President Powers to execute the contract with Cook County which, in turn, authorized the institution of the suit at bar) and 3 against such authority. No legal authority thus ever vested in Powers to sign the contract.

Omitted from Vol. II by the plaintiffs, but contained in Jones' R. No. 40788, p. 130, is a copy of a purported meeting of the Institute Board on November 19, 1965, to which is attached a copy of the Agreement Powers, on November 17th, had sent to the Institute Board members, and Resolution, certified to by Secretary Coghlan that it had been passed at that November 19, 1965 Board meeting authorizing and directing the president and secretary to execute it. *There was never such meeting held,* as was later admitted at the Institute Board Meeting on February 18, 1966 (Abs. 101-102; Vol. II, Minutes of February 18, 1966).

All the foregoing was discovered in the preparation of the Jones' Motion and Amended Motion to Dismiss the Amended Complaint when the corporate records and minutes were examined in detail. As a result, Zillman, Luken, and Hettleman met Powers on February 9, 1966 (Affidavit of William Hettleman attached to Jones' Amended Motion to Dismiss the Amended complaint, R. 40788, pp. 152-156 gives a full account of that meeting). Zillman wrote Powers again on February 15, 1966 pointing out the distortions in the minutes of November 12, 1965 and November 19, 1965. The plaintiffs did not include the Zillman letter of February 15, 1966 with the minutes of February 18, 1966 of the Board, as they should have (Abs. 101-102, Vol. II, Minutes of February 18, 1966). Jones' R. 40788, pp. 164-65 does, however, contain that

Zillman letter which was attached to his Amended Motion to Dismiss the Amended complaint.

Luken's letter was attached to the Hettleman Counter-affidavit, in opposition to the plaintiffs' motion for summary judgment, which was presented to the trial court at the hearing thereon, pursuant to his statutory right to do so, (Appendix F, sec. 57(3)), but which O'Brien, J., refused to file (Hettleman & Edmunds Record No. 40603, Document No. 6, Supplemental Petition for Leave to Appeal to Illinois Supreme Court, Exhibit D). The Minutes of the Institute Board Meeting on February 18, 1966 (Vol. II) purport to be a ratification by the Institute Board, as principals, of their admittedly illegal acts, as agents, on November 12, 1965, which was urged on Donald J. O'Brien, J. in argument, in all seriousness!

Powers' above letter of November 17, 1965 to the Institute Board members present at the November 12, 1965 meeting referred to his submitting a copy of the enclosed Agreement to the assistant to the County Board President. On November 23, 1965, the County Board passed its Ordinance (Appendix F-6) authorizing the execution of the agreement by President Simon. That agreement was executed on December 6, 1965, purportedly for the Institute and Cook County. The complaint, and that agreement attached thereto as Exhibit C were filed on December 10, 1965, in the Circuit Court of Cook County, Chancery Division, as 65 CH 6863.

HOW THE CONSTITUTIONAL QUESTIONS WERE RAISED IN THE STATE COURTS.

A. In The Trial Court.

The case at bar was assigned to Cornelius Harrington, J. He disqualified himself, upon defendant Hettleman's affidavit, to which was attached the 1963 judges' report, that, prior to the expiration of the 11th decennial lease, in 1962, his threat of ouster, unless the Institute library were given to Cook County, initiated the compromise deal at the Mid-Day Club, on December 10, 1962. He then reassigned the case to Donald J. O'Brien, J., although he well knew of Judge O'Brien's connection with the subject matter from 1963 on, at least.

1. By J. Edward Jones, Intervening Defendant.

He also filed a petition for change of venue, but O'Brien, J. refused, contrary to law (1965 Ill. Rev. St., C. 146, §1), to disqualify himself, for bias or interest, and thus denied him procedural due process. Jones then filed an Amended Motion to Dismiss the Amended Complaint, under the Illinois Civil Practice Act, §48, supported by numerous records and documents, on February 15, 1966. His grounds, *inter alia,* were (Jones R. No. 40788, pp. 60-69, 125, 132-160) that the Institute was not chartered, and does not exist now, as a public or private charity, because: (1) no words of endowment, trust, trust *res,* donor or donors, settlor or settlors, or any donative intent appear in the charter, or any amendment thereto; (2) the only support the charter and by-laws provide for the Institute is by sales of aliquot ownership certifi-

cates to a professional group, lawyers in good standing (Abs. 18, 4th par.), without restriction as to race, color, nationality, or sex, upon payment of $100.00 application fee, the regular assessments, and fines, and the Executive Committee's approval of the application (Secs. 1 and 2 of the By-laws, Abs. 17) which appellees admitted, Abs. 42, par. 8 (No one, unable to pay, could use the facilities); (3) the benefits are not available *directly* to an indefinite and indeterminate number of people or class of the general public (1963 judges, report, Abs. 65, pages 14, 17, 21 of this Statement); (4) no visitatorial powers or inspection of the library or the management, by any governmental, municipal or other public agency, officials or servants, or by any trustees, are conferred; (5) the usual corporate officers are provided for (charter, §4; by-laws, §3) to be elected by the members' exercise of their personal and property right to vote, elect and to participate in the corporate affairs; (6) nor are the proceeds from the sale of stock or aliquot ownership certificates or the annual assessments to be deemed gifts, donations or unrestricted contributions by the members to The Chicago Law Institute, or to the general public, or to any class thereof, nor are they made to a trust, or charitable trust (See forms of assessment notices in Jones R. No. 40788, 178-179).

Jones contended further that the evident object of the amended complaint, and the practical effect of any decree prayed, was to dissolve the corporation, against which the members' special meeting on June 18, 1965, voted almost unanimously. The Institute was quite solvent (Pages 20, 21 of this Statement). The Illinois Attorney General had no cause of action to forfeit the charter for non-use or misuser. There was no genuine or real present, or impending, threat of the loss, dissipation or waste

of any assets, much less of all of them as alleged (Abs. 42, pars. 9 and 10), except that the Institute's officers were refusing to call the annual meetings at which assessments are to be levied (Abs. 29, By-laws, sec. 13) to support the Institute (Abs. 101, Vol. II, Minutes of December 17, 1965 contained Institute Board Resolution, as did the minutes of January 16, 1966, to defer calling the annual meeting for Friday, January 28, 1966) and were exhausting cash and pauperizing the Institute to pay about $25,000 attorney fees to maintain the colorable suit at bar.

Other Jones'. grounds were that the suit was colorable; that the prayer of the Amended complaint would deny the Institute and its members access to the courts; that the plaintiffs had no legal capacity to file the application *cy pres* since the State only, as parens patriae, could file suit to preserve a *public* charity and control the litigation; that the 1907 amendment was pursuant to the Laws of 1901, par. 2 which provided (the General Not-for Profit Corp. Act came in 1944):

> "That hereafter, whenever any corporation, not for profit, existing by virtue of any special law of this State, shall desire to . . . change the object . . . such change shall not operate as a waiver, release or forfeiture, of any of the powers, rights or privileges of such corporation granted to or secured by it under and by virtue of such special act, and all acts or parts of acts in conflict herewith are hereby repealed." (Appendix F-1)

Pars. 5-6 of Jones' Amended Motion to Dismiss the Complaint (Jones R. No. 40788, pages 64-67) recites that the establishment of Cook County within the Counties Law Libraries Act, c. 81, sec. 81, and Cook County's implementary ordinances, was part of the scheme to de-

prive the Institute, and its members, of their property, contrary to the 5th and 14th amendments to the U. S. Constitution. His motion was denied without any comment from the trial judge, Donald O'Brien, before whom that motion was argued at great length by appellants Hettleman and Jones.

2. By Black et al.

The Black et al. Answer covered pretty much the ground covered in the Jones' Amended Motion to Dismiss the Amended Complaint: Par. 9 (Abs. 56). Referring to the November 23, 1965 Cook County Ordinance authorizing the execution by Simon of Exhibit C attached to the Complaint, it stated that it was passed in collusion with the unfaithful Institute Board members to

> "accomplish a confiscation of the assets and law library unto the plaintiff belonging, without any compensation whatever, and, if consummated, would constitute a denial of due process in the taking, and deprivation of private property in violation of the 14th amendment, sec. 1, and 4th and 5th amendments to the Constitution of the U. S."

The Black et al. Answer at par. 14 (Abs. 59-61) sets out 12 counts of a bill of particulars on the alleged conspiracy between Cook County and unfaithful Institute Board members, prior to and after the members June 18, 1965 special meeting, in doing sundry things, including the passage of the 1963 amendment to the County Law Libraries Act (1965 Ill. Rev. Stat. c. 81, § 81) and the various implementary ordinances referred to in "Questions Presented" on pages 4-8 of this Statement.

Summary judgment is forbidden under Illinois, and probably in most states, where one material fact even is

put in issue since that drastic and extraordinary procedue can be used readily, as it has been in the case at bar, to deny procedural due process. Yet the Record reveals that the pleadings put in genuine issue multitudinous facts material to arriving at a sound judgment.

3. By J. Edward Jones.

After denial of Jones' Amended Motion to Dismiss the Amended Complaint, he filed unsuccessfully a Motion to Strike the affidavits in support of the Plaintiffs' motion for summary judgment, or, in the alternative, a Motion for Judgment on the Pleadings. It reviews much of the material in his Amended Motion to Dismiss the Amended Complaint (Jones' R. No. 40788, pp. 252-259), but he attacks at B-e the Cook County Implementary Ordinance of June 17, 1965 and action thereunder as state action, and, at B-g, the power which the 1963 amendment to c. 81, §81, Ill. Rev. Stat. (1965) (the Counties Law Libraries Act) has given to commit fraud, and concludes, after summarizing the efforts to deprive the Institute, and its members, of property:

> "E. The action proposed by the plaintiff, pursuant to the proposed plan set forth in the complaint, if consummated pursuant to the judgment of this or some higher court, would constitute a denial of due process of law and a deprivation of property in violation . . . of the 14th and 5th amendments to the U. S. Constitution."

4. By William Hettleman.

Appellant Hettleman presented at the hearing, on June 20, 1966, on the plaintiffs' motion for summary judgment his counter-affidavit. (*St. Louis Fire & Marine Ins. Co.* v. *Gariner,* 24 Ill. App. (2) 408, 416 (1960) sustained such

right.) After being stamped "Filed" by the Court Clerk, O'Brien, J. directed that it be marked "Void" (Doc. No. 6, Exh. D transmitted to this Court by the Ill. Supreme Court Clerk), and returned it to appellant Hettleman on the ground that he had entered an order, upon dismissal of the Jones' Amended Motion to Dismiss the Amended Complaint, for all Answers and Counteraffidavits to be filed at an earlier date. Appellants Jones and Edmunds filed their Answers timely, adopting the Black et al. Answer (Jones' R. No. 40788, p. 273) filed by their attorney Irving Breakstone who, at the time was also appellant Hettleman's attorney, prior to Breakstone's withdrawal so Hettleman could proceed *pro se*. It was unnecessary, therefore, for appellant Hettleman to file an Answer. Upon advice of Attorney Breakstone that no counteraffidavit need be filed prior to the hearing, under the Ill. C.P.A., §57(3), (Appendix F-8), to abridge which time no trial court had been given, under any authority, the right, appellant Hettleman complied with the said statute. Moreover, appellant Hettleman had been under very great distress and burden, due to his wife's having undergone surgery for the removal of a tumor from her brain the size of an orange. Loss of her mind and hearing were threatened. His constant attendance at her hospital bedside was imperative. O'Brien, J. well knew all this from the Hettleman petition, which he denied, for a week's postponement of the hearing on the plaintiffs' motion for summary judgment, so he could accompany her, air traveling in a wheel chair, to New York to consult certain specialists there, and for recuperation. His counteraffidavit comprised 8 typed, legal size pages, to which were attached 6 full exhibits, all of which took some time to assemble and prepare, especially under such adverse circumstances.

His counteraffidavit attached the affidavit of Luken, corroborative of the Zillman letter, dated February 15, 1967, also attached (Jones' R. 40788, pp. 164-165; pp. 28-29 of this Statement), as to what really transpired at the November 12, 1965 Institute Board meeting, which voted illegally the "donative" contract and the filing of a suit seeking approval thereof under *cy pres;* pointed out that there had admittedly been no meeting (Abs. 101, Vol. II, Minutes of February 18, 1966, after the suit at bar was filed on December 10, 1965) on November 19, 1965 at which the Amended complaint, par. 9 (Abs. 7), alleged "The execution of Exhibit "C" on behalf of the Institute was authorized by a resolution of the Board of Directors;" attached photocopy of the reply of John W. Daly, dated December 18, 1963, to Ben Liss' letter, dated December 11, 1963 (p. 20 of this Statement) denying the applicability of *cy pres,* and rebuking him for seeking advance approval thereof by the judges and the Attorney General.

Appellant Hettleman's counteraffidavit pointed out additional disputed facts in the proceedings, and the relationships between the alleged conspirators, to determine the truth of which required trial, and to ignore which constituted an arbitrary and unwarranted denial of pocedural due process of law, in violation of the 5th and 14th amendments to the U. S. Constitution.

B. In The Appellate Court, First District.

Three sets of defendants appealed the decree of July 13, 1966 (Abs. 131-132): (1) Black et al., represented by Irving Breakstone; (2) Hettleman and Edmunds, represented by William Hettleman; and (3) J. Edward Jones, *pro se.*

1. By Hettleman and Edmunds in No. 51619.

Black et al., on July 14, 1966, duly filed their Notice of Appeal (Abs. 133-135) to the Illinois Appellate Court, First District, docketed as No. 51,619. They duly served a copy thereof that day on the plaintiffs' attorney. They made no attempt to serve their co-defendants, Hettleman, Edmunds, and Jones, as they were not required to do so, nor the adverse parties, Cook County and the Illinois Attorney General, as Rule 34 (Appendix F-9) did require them to do.

In the climate of this case, as may be judged from its history (pp. 16-22 of this Statement), the Appellate Court, First District judges were only too eager to seize upon any excuse to dodge the constitutional questions presented by the appeals and to deny procedural due process of law. The artful plaintiffs soon provided them the "out", in a successful motion granted on September 20, 1966, to dismiss appellants Hettleman and Edmunds for an alleged non-compliance with Rule 35 (Appendix F-9). The following facts should, themselves on their face, prove that Rule 35 was wholly inapplicable and was introduced by appellees as a feigned independent and adequate, purely procedural question to bar ultimate review by this Court:

On July 15, 1966, the appellees mailed appellants Hettleman, Edmunds, and Jones an identical paper entitled "Notice of a Notice of Filing a Notice of Appeal." The plaintiffs' attorney signed it. It advised of the receipt by the plaintiffs of the Black et al. Notice of Appeal on July 14, 1966, and attached a copy. The plaintiffs claimed in their motions to dismiss, on August 19, 1966, that Rule 35 was thus brought into play, to require the appellants

to serve someone unstated, by July 25, 1966, a written intent whether the appellants would join Black et al. in their appeal, or appeal separately, although § 76(1) of the C.P.A. (Appendix F-8) provides an appellant 30 days, after the entry of a judgment, in which to file his notice of appeal in the trial court, the only jurisdictional requirement. Appellants thus had until August 12, 1966 in which to meet the jurisdictional requirement, which they did duly meet on August 12, 1966; no statute provided that the 30 days could be cut down by invoking Rule 35 or any other court rule. The Hettleman-Edmunds appeal in the Appellate Court was also docketed No. 51619 and Jones' appeal directly to the Illinois Supreme Court was docketed there as No. 40154.

The plaintiffs' motions to dismiss the appellants, in the respective courts, for alleged non-compliance with procedural rule 35, were resisted as the denial of their rights to have their appeals heard fully, because (1) Rule 35 did not authorize plaintiffs, as principals, or as Black et al. agents, any more than it authorized those aligned with them, Cook County and the Attorney General, to mail appellants the paper they did; (2) if it did, or if Black et al. had themselves mailed their Notice of an Appeal, on July 15, 1966, directly to appellants, such notice would contravene the appellants' statutory right under said C.P.A., secs. 76(1) and (2) by cutting down unauthorizedly (Appendix F-8a, section 2, page 44a) the requirement for compliance therewith from 30 days to 12 days; (3) in the latter situation, if there were authority for such mailing having the effect of cutting down the appellants' 30 days for filing a Notice of Appeal, thus bringing Rule 35 into play, the failure of Black et al. to comply with Rule 34 (Appendix F-9) by serving a copy

of their Notice of Appeal on Cook County, by July 24, 1966, was an abandonment of their appeal, as Cook County and the plaintiffs urged successfully in their November, 1966 motion before the Appellate Court to dismiss the Black et al. appeal; Rule 35 had become spent by July 25, 1966; no co-party appellants Black et al. existed then on whom to serve the alleged required notice of intent, and the plaintiffs could not stand in better shoes as agents for Black et al., for whom they evidently purported to act by mailing their paper, on July 15, 1966, to appellants; (4) the dismissals of the appellants' appeals were arbitrary, capricious, contrary to the Supreme Court's own rules 301 and 303(b) and the courts' decisions; (5) and the spirit of § 4 of the Illinois C.P.A., (Appendix F-8) and Rule 73(a) and (b) of the Federal Rules of Civil Procedure and Title II, Rules 3(a) and (d) of the Federal Rules of Appellate Procedure (Appendix F-11).

The palpable injustice *of possibly* cutting appellants' time to as little as 10 days, under Rule 35, inconsistent with C.P.A. sec. 76(1) (Appendix F-8), and in substantiation of appellants' contention that Rule 35 permitted them, in fact, 40 days (to August 22, 1966) from the entry of the July 13, 1966 decree in which to file in the trial court their Notices of Appeal (had Black et al. served their Notice of Appeal on them directly, for instance, on August 12, 1966), led the Illinois Supreme Court to revise Rule 35 tentatively before appellants' Notices of Appeal were actually filed on August 12, 1966.

On May 20, 1966, almost 3 months before appellants filed their Notices of Appeal, the Illinois Supreme Court distributed a tentative final draft of new rules

for study, comment, suggestions, etc. These rules became effective January 1, 1967, including Rule 301 (Appendix F-10) which stated that the only jurisdictional step was filing a notice of appeal, every final judgment of the circuit (trial) court in a civil case being appealable as of *right;* and including Rule 303, to replace Rule 35, which made former Rule 35 clear, and free from ambiguity or illegality. Rule 303(b) (Appendix F-10) stated that

> "If a timely notice of appeal is served by a party, any other party, within 10 days of service upon him, *or within 30 days of the entry of judgment, whichever is later,* MAY join in the appeal, appeal separately or cross appeal, by filing a Notice of Appeal."

The Appellate Court judges were, likewise, aware of this proposed clarification, or interpretation, of Rule 35. This Illinois Supreme Court interpretation of Rule 35 constituted a caveat, at least, that the filing of appellants' Notices of Appeal, on August 12, 1966, within 30 days of the entry of the July 13, 1966 decree, was within the spirit of the liberal construction sec. 4 of the C.P.A. (Appendix F-8), and provided Black et al. timely notice of the appellants' intent to appeal separately, even though Black et al. themselves had mailed their Notice of Appeal to the appellants on July 14 or 15, 1966. The appellees could have stood in no better shoes.

The appellees never showed any prejudice to any rights they may have had by any circumstances intervening in the 19 days between July 25, 1966 and August 12, 1966.

If appellant Hettleman's failure, *pro se* and as Edmunds' attorney, to comply with Rule 35 was a dereliction (despite that he did not learn of the "Notice of a Notice of Filing a Notice of Appeal" until his return to Chicago on

August 3, 1966 from a visit to his ailing wife, in the East, of which contemplated visit the appellees knew before July 15, 1966), the Appellate Court, First District, in the case of appellants Hettleman and Edmunds, and the Illinois Supreme Court, in Jones' case, meted out no punishment whatever, much less such drastic penalty as dismissal, for much worse and clearer derelictions in the following Appellate, First District, or Illinois Supreme Court, cases called to their attention: *Barbee* v. *Evans,* 220 Ill. App. 154, 159; *Chicago Cosmetic Co.* v. *City of Chicago,* 374 Ill. 384, 388; *Pieczyski* v. *Pieczyski,* 323 Ill. App. 649; *Rowan* v. *Matanky,* 348 Ill. App. 296.

In *Bradley* v. *Metropolitan Sanitary District,* 56 Ill. App. 2d 482 (First District, 1965), though the appellants admitted minor non-compliance, the motions to dismiss their appeal were denied as nit-picking, at page 489:

> "because they raise mere technicalities, and seek to avoid decisions on the merits. In *Foman* v. *Davis,* 371 U.S. 178, 181, the Court said
>
> > 'It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities.'"

2. By Black et al. in No. 51619.

The Hettleman-Edmunds' motion of September 26, 1966 in the Appellate Court to reconsider was denied on October 4, 1966 without comment or reason. Appellant Hettleman then assisted Irving Breakstone, attorney *pro se* and for Black et al., in preparing their printed Brief and Argument which was filed in the Appellate Court on October 25, 1966, together with the Record, and the printed Abstract of Record, in No. 51619. Point IV, pages 70-72, referring to the background of the suit, summarized in the

section on Statement of the Case in this Statement, and the Black counteraffidavit in opposition to the plaintiffs' motion for summary judgment, argued that the plaintiffs were in Court with unclean hands, seeking by conspiracy with Cook County to cause, by refusing to levy assessments, the very inability of the Institute to continue financially upon which they predicated their application for *cy pres,* and that their pretensions in filing the suit at bar were (Abs. 53 a) "a pure sham, under the allegedly 'legally enforceable duty', to confiscate the Institute's assets for a public use without pay, violative of the Illinois and U.S. Constitutions."

The Outline of Points and Authorities, pages 3-5, Point IB, indicates 8 major reasons for error in the trial court's Opinion (Appendix A of this Statement; Abs. 137-139), not the least of which was the justification for the Institute Board's illegal action on November 12 or 19, 1965, after the June 18, 1965 members' special meeting, because sec. 4 of the Institute's By-Laws (Abs. 19) states the Executive Committee shall

> "exercise a general control and supervision over the affairs of the Institute, and over its officers, committees and employees." (Abs. 138, No. 3 and No. 6)

The Appellate Court was given the complete answer to the trial court's opinion that the Executive Committee could contract to sell, mortgage or give *all* the assets away of the corporation without the necessary vote of its members consenting thereto (Brief 40-48), by citing this Court in *Rogers* v. *Hill,* 289 U.S. 582, 591, that even the majority stockholders cannot authorize a gift which amounts to spoilation or waste of corporate property against the protest of a single stockholder even. To the same effect were cited *Parrott* v. *Noel,* 8 F(2) 368, 371-372; *Brayton* v.

Welch, 39 F.S. 537, 539; *McQuillan* v. *National Cash Reg.*, 27 F.S. 639, 651. Also cited to the Appellate Court were cases decided by the highest Illinois court that a Board of Directors cannot ratify its own prior illegal acts *after* suit filed, even if the members thereof own most of the corporate stock: *Klein* v. *The Pyle-National*, 289 Ill. 157, 168.

The principles of *Dartmouth College*, 4 Wheaton 518 were also called to its attention as controlling (Brief 21-27). *Dartmouth College* pointed out the distinction between public and private corporations. *Washington Home* v. *Chicago*, 157 Ill. 414, 423-425 (Brief 26-28) followed *Dartmouth College*. The Brief (pp. 50-59) demonstrated the trial court's lack of jurisdiction because the members had refused, at their June 18, 1965 special meeting, the use of the corporation's name in any suit seeking to take away its property without consent or compensation, by application to a chancellor to exercise *cy pres*, and because, on the allegations of the Amended complaint that, fearing the Institute's assets would be *wholly* lost and dissipated, the State alone, as parens patriae, must file and control the suit. There was an alleged "enforceable" duty on the plaintiffs to file the suit, a concept borrowed from general business corporation law that, upon the charge by minority stockholders that the majority stockholders were oppressing them, the directors had the enforceable duty to take legal action to protect the minority (See Hornstein, 40 Columbia L.R. 220, passim). Lack of the trial court's jurisdiction over the subject matter was demonstrated at pages 29-38 of the Brief.

The Black et al. Notice of Appeal was dismissed on December 14, 1966, without comment or reason. Thereupon, on December 29, 1966, appellants Hettleman and Edmunds filed a motion in the Appellate Court to vacate its dis-

missal order of September 20, 1966 on the ground that, the Court having evidently held that Black et al. had abandoned their appeal on July 24, 1966, as Cook County and appellees contended, Black et al. were no longer co-parties appellant on July 25, 1966 and, if Rule 35 had been properly brought into play theretofore by appellees' mailing appellants "Notice of a Notice of Filing a Notice of Appeal", Rule 35 had become spent and inapplicable. The motion of appellants Hettleman and Edmunds to vacate was denied on January 11, 1967, without any comment or reason.

3. By Hettleman and Edmunds in No. 51962.

Appellants Hettleman and Edmunds were left their right, under the C.P.A., s. 76(1), and the Illinois Supreme Court Rule 29, (Appendixes F-8, 9). These permitted a petition to the Appellate Court for leave to file their Notice of Appeal within 1 year of the entry of the decree on July 13, 1966, on the ground that they were not guilty of culpable negligence, and that their case was meritorious. Accordingly, on January 24, 1967, they attached to their petition an Abstract of Record, as required, which was that filed theretofore by Black et al., their supporting Brief, which was also that theretofore filed by Black et al. (both had been filed on October 25, 1966 in No. 51619), and their Praecipe, as required, which these appellants had, on August 22, 1966, filed with the trial court clerk for certain parts of the record to supplement the Praecipe of Black et al. in No. 51619 (appellee's motion to dismiss appellants' appeal was granted on September 20, 1966, before these parts could be sent up to the Appellate Court). The petition for leave was docketed as No. 51962.

The arguments on the merits referred to those portions of the Brief in Number 51619 which had already

been presented by Black et al. (pages 41-42, inclusive, of this Statement) and, in addition, the petition for leave proved conclusively, (supported by documentary evidence) that the 1907 amendment to sec. 2 of the Institute's charter was merely declaratory of the non-profit, net cost, completely private character of the Institute from its inception (Doc. No. 3 transmitted by the Clerk of the Illinois Supreme Court to this Court), so that *cy pres* was inapplicable, and all state statutes enacted to support *cy pres* and court proceedings thereunder were null, void, and of no legal effect. Their petition was denied on February 20, 1967, without comment or reason. An order granted their prayer, nevertheless, to adopt the Record in the trial court, the Abstract of Record, and the Brief filed by Black et al. in 51619, as corrected by appellants. They were marked "Filed" and transmitted under the Appellate Court Clerk's certificate to the Supreme Court of Illinois who transmitted them to this Court (Doc. No. 3) on the appellants' Hettleman and Edmunds appeal from No. 40603. The appellees did not *print* their Answer to the Petition, as the Supreme Court Rule 29 and the Appellate Court Rule 21 required, and as appellants Hettleman and Edmunds pointed out, but typed them; the Appellate Court paid no attention to this dereliction.

C. In The Supreme Court Of Illinois.

1. Jones had appealed the trial court's orders (dismissing his Amended Motion to dismiss the Amended complaint, denying his motion to strike the affidavits supporting the plaintiff's motion for summary judgment, and its final decree on July 13, 1966) *directly* from the trial court to the Illinois Supreme Court, in No. 40154, under the C.P.A., Section 73, and its Rule 28-1, pursuant thereto

(Appendix F-9). (See page 36 of this Statement). His affidavit, supporting his appeal and opposing appellee's request for additional record, recited that he had adopted the Black et al. Answer as part of his Answer to the Amended Complaint, but that the appellees made no reply thereto, nor did they obtain an order that their reply to Black et al. stand as their reply to his Answer.

Jones' Objections to the appellees' motion to dismiss his appeal made an extensive argument that, to apply Rule 35, constituted a denial of procedural due process. His affidavit, in support of his Objections, recited the history of the litigation, including the usurpation of authority and power by the appellees.

Before his record could be prepared according to the timely filing of his praecipe, his Notice of Appeal was dismissed, without comment or reason, on September 14, 1966.

2. *Black et al.* filed on February 3, 1967 their Petition for Leave to Appeal to the Supreme Court of Illinois from the Appellate Court final order of December 29, 1966 dismissing their appeal. The Appellate Court Clerk had been directed to send the Record there to the Supreme Court of Illinois. Attached to the Petition was the Abstract of Record in No. 51619. The Black et al. Petition presented, inter alia:

> "c. Petitioners have been deprived of their Constitutional right of appeal, of their right to a *pro tanto* distributive share, upon any final dissolution of The Chicago Law Institute, a private, but not a private or public charitable, corporation, in and to its approximately 150,000 volume internationally famous law library having a present replacement cost of approximately $2,000,000, cash and securities, the decree of the trial court, unless reversed, having approved transfer of its

said assets to a municipal corporation, Cook County, Illinois, for the use of the general public without any compensation therefor, contrary to the State and Federal Constitutions, under an erroneous application of equity's power cy pres, upon a motion for a summary judgment without a trial, despite multitudinous disputed issues of fact requiring confrontation and cross examination of affiants who presented only self-serving affidavits."

The points relied upon, and attached to the Petition, were the Points and Authorities comprising pages 3-11 of the Brief and Argument filed in the Appellate Court, on October 25, 1966, in No. 51619, by them, and as corrected by the appellants Hettleman and Edmunds' Petition for Leave to File a Notice of Appeal under Rule 29 (within 1 year of the entry of the decree on July 13, 1966), on February 20, 1967, in No. 51962 (Doc. No. 4 transmitted to this Court by the Clerk of the Illinois Supreme Court, since it was also filed by the latter there, on April 17, 1967, on their appeal). On March 28, 1967, the Supreme Court of Illinois dismissed the Black et al. Petition, without comment or reason. The Black et al. attorney, Breakstone, died soon after and no further action was taken.

3. Hettleman and Edmunds filed, on April 17, 1967, their Petition for Leave to Appeal to the Supreme Court of Illinois (Doc. No. 1 transmitted to this Court by the Clerk of the Supreme Court of Illinois), and Supplemental Petition, on May 3, 1967 (Doc. No. 6), from the February 20, 1967 order of the Illinois Appellate Court, First District, Second Division, in No. 51962, which denied leave to file a Notice of Appeal under the 1 year rule. Pursuant to that order, there were attached to the Petition for leave to appeal to the Supreme Court in No. 40603 the Record in the trial court, the Abstract of Record, as corrected,

and the Brief and Argument, as corrected, (both filed on October 25, 1966, by Black et al. in 51619) as part of the appellants (Hettleman and Edmunds) Appellate Court Record in No. 51962.

Point I, B (Doc. No. 1, pp. 3, 1-36) presented 2 substantial constitutional questions, the second of which read;

> "2. In the light of the factual background leading up to the amendment, in 1963, to Ill. Rev. Stat., chapter 81, sec. 81, extending the County Law Libraries Act to Counties of 500,000 population or over; did the Illinois Legislature intend by said amendment, and was the effect of said amendment, to amend the charter of the Chicago Law Institute to transfer the control thereof from the officers and managers of the Institute (constituting its Executive Committee) to Cook County, as the purported new trustee, or to its purported sub-trustee or agent, the Advisory Board to the proposed Cook County Law Library?"

That Petition for Leave, and the continuation thereof in Document 6, Supplemental Petition for Leave (p. 2) also discussed the violation of Art. I, sec. 10 by the implenmentary Cook County Ordinances, under the first constitutional question presented; the denial of procedural due process by the dismissal of the Hettleman-Edmunds Notice of Appeal by the Appellate Court (Doc. No. 1, Point II, pp. 3-5, 37-43) where the same subject was treated in the Petition for Leave to File a Notice of Appeal under Rule 29, and the C.P.A., sec. 76 (see page 44 of this Statement); the national importance of the constitutional questions involved (Doc. No. 1, Point I, pp. 2-3, 15-18); the lack of the trial court's jurisdiction over the subject matter (Doc. No. 1, Point III, pp. 5-6, 44-58; Doc. No. 6, pp. 3-22) and over the parties (Doc. No. 1, Point III, B, p. 6; No. 6, pp. 22-25); and the plaintiffs' failure to meet the

requirements of an application of judicial *cy pres*. (Doc. No. 1, Point IV, pp. 7-8; Doc. No. 6, pp. 30-45). The trial court's denial of due process are noted in Doc. No. 1, Point III, C and D, pp. 6-7; Doc. No. 6, pp. 25-29.

Document 12, the unsuccessful Motion to Reconsider, made the point that the *Dartmouth College* case's principles governed the case at bar, and, if the Court found that, according to them, the Institute was a private corporation, then it was immaterial if it also were a private educational and charitable corporation which appellants denied throughout. The Ill. Rev. Stat., ch. 81, sec. 81 amendment in 1963 (County Law Libraries Act) sought to remodel the Institute's Special charter of 1857 without its or its members' consent and so was unconstitutional, and, if so, Cook County could not take the Institute library, the inapplicability of *cy pres* to private property aside.

The Black et al. Petition for Leave to Appeal presented the mere skeleton outline of the Points and Authorities. That of Hettleman and Edmunds went into great detail about the reasons why the Petition should be granted. Neither approach moved the Supreme Court of Illinois to state its reasons for the record. Orders were simply denied, without comment or reason.

Doc. No. 14 of Index to Documents was an unsuccessful motion, citing chapter and verse, for the Illinois Supreme Court to certify the rationale of its order denying leave to appeal and denying reconsideration of that order, so that its *ratio decidendi* could become part of the Record.

4. On July 10, 1967, appellant Jones filed a timely petition (under the one year Rule 29 and C.P.A. sec. 76(1) for leave to file his Notice of Appeal) which stated

> "Your petitioner particularly prays that this Court will pass upon the Federal and State constitutional issues raised in this, his petition, for leave to appeal, so that, in the event of an adverse decision, he may have the proper basis for further review, if such action is deemed proper."

and prayed

> "2. That this Court pass upon all constitutional issues raised in these proceedings."

Pages 4 of his Petition noted the denial of procedural due process, in violation of the 14th amendment of the U.S. Constitution, by dismissal of his appeal under the wholly inapplicable Rule 35, as construed by the Supreme Court in a clarification thereof as Rule 303. Pages 6-16 of his Petition reviewed the facts of the conspiracy, the usurpation of power, and infringement of his constitutionally protected rights. His petition was denied, on September 14, 1967, without comment or reason, on the same day that the Court refused to issue its certificate, requested by appellants Hettleman and Edmunds, of its *ratio decidendi* in all the proceedings before it.

Order after order, after order, has been entered in all the proceedings in the Illinois appellate courts without comment or reason. Not even a brief memo appeared supporting the validity of the "donative" contract, Exhibit C attached to the Amended Complaint, for whose execution, voted *Allman* and *Cecchini*, undisclosed agents of Cook County, on November 12 or 19, 1965, as 2 of the 4 votes against, although they were, on November 12 or 19, 1965, acting also in a fiduciary capacity, as members of the Institute's Board, to its members and were bound to respect the mandate by them, on June 18, 1965, to the Institute Board not to execute a "donative" contract with Cook

County, not to use the Institute's name in any suit to approve such contract, and not to seek the corporation's dissolution.

We submit that the Notices of Appeal were dismissed arbitrarily, contrary to the courts' own rules and decisions, to avoid confrontation of the constitutional questions involved and presented, or else that, considering that no independent and adequate non-federal procedural question was truly involved, they decided that the constitutional questions presented to them were without merit.

THE QUESTIONS ARE SUBSTANTIAL.

The questions presented by this appeal are substantial in that they raise directly fundamental constitutional issues with respect of the use by counties, which are but quasi-municipalities, of legislatures to amend charters of private corporations without their consent, as forbidden by the contract and due process clauses of the U.S. Constitution, in order to invoke *cy pres* to permit such quasi-municipalities to take private property for a public use without compensation, as a substitute for condemnation procedures.

There were listed in the 1963 edition of *Directory of Special Libraries* (Gale Research Company, Detroit, Mich.) 10,000 special libraries (a 2d edition to be published soon will list over 13,000) where information may be sought on over 1200 different subjects. Legal information in law books, court reports, etc. is available at about 910 such libraries in the U.S., the next relative subjects being medi-

cine at 672 libraries and engineering at 331 libraries.[1] Most of these libraries are *privately* owned. Additionally, there are all sorts of recreational libraries in private clubs, lodges, private homes and offices, etc.

What of the libraries in *non-public* elementary and secondary schools, *privately* owned colleges and universities, or *law* libraries in *law* schools, *other than state controlled*, whether university affiliated or not, large law firms, in large corporations, a more recent development and in large office buildings, also a recent development? Will the case at bar, if the decree of the trial court is not reversed, set a dangerous precedent, where political motives may lead to the appropriation of *private* libraries on the theory that all are educational, and hence charitable, under the strained construction contended for by appellees that 43 Elizabeth, c. 4, covers them, and where *cy pres* would be invoked (in anticipation of possible future financial inability to continue to operate them) to transfer title to their libraries to some *public* corporation? (The Harvard Law School law library, now the largest in the world, had fallen into sad desuetude till Langdell revived it.) The social import of this problem, it will soon be demonstrated, far overshadows the private rights of The Chicago Law Institute and its members, however important they are and however they are entitled to the protection of this Court against infringement of their federally guaranteed rights.

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[1] Subjects on which information may be had in at least 100 libraries are: chemistry at 291; electronics 273; education 241; religion and theology 223; art 211; science and technology 170; business and business administration 164; music 164; metallurgy 135; pharmacy 119; physics 116; geography 114; economics 107; petroleum 106; newspaper 105.

A. Other Than Law Libraries.

A detailed analysis is contained in Appendix G to support these conclusions therefrom:

1. The trend is growing for *state* control of our college and university libraries; e.g. 57% of them in the Fifth Circuit are state owned; 56.64% in the Ninth; and 60% in the Tenth.

2. *Privately* owned educational and charitable 1255 college and university libraries, smaller generally than those publicly owned, have a tremendous stake in preserving their *private* property and their autonomy through this Court's ever-watchful protection.

B. Law Libraries.

A detailed analysis is contained in Appendix H to support these conclusions therefrom:

1. Of 358 law libraries, containing 13,383,000 volumes, 15% (54), which are owned publicly, contain 35% of these volumes, indicating a wide dispersal of *small, privately* owned law libraries, unable, in the main, to defend themselves.

2. The trend is likewise growing for *state* control of law school libraries. The 54 *publicly* owned law school law libraries comprise 40% of the 135 law school law libraries in the U.S. 46, or 85.18%, are located in the six Circuits southwest and west of the Mississippi River.

3. The law libraries of private, professional membership service corporations, housed in county courthouses or publicly owned realty, are especially vulnerable.

The Chicago Law Institute does not stand alone as a private membership professional service corporation whose library is housed in a county courthouse building. The

Law Library Association of St. Louis, Missouri, 1300 Civil Courts Building, St. Louis, Missouri, incorporated in 1838, obtains its sole support from members' annual assessments. It has a lease arrangement similar to that of the Institute, paying for space to house its 80,000 volumes by giving free service to all judges and public officials.

The Duluth Bar Library, incorporated in 1899, 515 St. Louis County Court House, Duluth, Minnesota, owns its 40,000 volumes under a similar lease arrangement, but the County owns the bookstacks, tables and chairs and pays the Librarian.

The Berks County Law Library, incorporated 1859, houses its 20M volumes in the Reading, Pa. courthouse under an arrangement similar to that of Duluth.

It would appear that the Philadelphia Bar Association library of 155,000 volumes, is located in the City Hall, and the Baltimore Bar Library of 95,000 volumes is housed in the courthouse, under arrangements similar to that of the Institute, but more information is being awaited on the former.

The Social Law Library of Boston, Mass., incorporated in 1804, houses its 134,000 volumes in 1200 Court House, supported by annual assessments on its lawyer-members, who alone may use its books. The space and some money are provided in consideration of being the depository of Supreme Court records, briefs, etc.

Information is being awaited from others who may wish to ask leave to file briefs as amicus curiae, if review is granted.

Do some or many of the *privately* owned law school, law firm, corporation law-libraries, and the 672 *privately* owned liberal art college libraries in the United States, as

a result of the Illinois legislative and court *cy pres* technique face a lurking danger which they do not even suspect as yet, and will not realize until pounced upon? This Court's decision may forewarn them.

C. The Dangerous Library Gap.

A phenomenon of modern times is the "knowledge explosion", as enrollments in all sorts of schools have soared and will continue to do so. The *functional* library is a very important part of the educational apparatus in schools at the elementary, secondary, collegiate, university, and professional levels. The shortage of libraries in all these has become so acute, and threatens to become so bad, that the U.S. Office of Educational Services Branch of the U.S. Dept. of Health, Education and Welfare, caused to be made a national inventory of library needs in the U.S. The results were published in Chicago, in 1965, by the American Library Association. Page 1 and Chart B, at p. 8, thereof indicate that, whereas the enrollments were 40.2 million in public, and 6.7 million in *non-public,* elementary and secondary schools, in the fall, 1963, the total may jump to 55.4 million by 1975. The general population, which has doubled from 1915 to 1965, and stood at 193 million in 1963 (half the net growth being in the 5-19 year age group), is expected to reach 245 million by 1980.

The estimates in numbers of volumes and their cost of acquisition plus servicing, to meet the urgent need, and ALA book collection standards, are simply astronomical. The data is so inadequate on correctional, medical and special libraries that the American Correctional Association and American Hospital and Institutional Division of the ALA could not even assess their needs in comparative tabular form. For example, the national shortage in the *public* schools, state controlled colleges and universities,

and in the *public* libraries, is over 390,000,000 volumes which, to buy, process and put on the shelves, would cost $2,557,000,000, plus the cost of librarian and staff services, plus the cost of keeping such libraries up to the ALA standards (See Table 3, p. 6). The shortage in the colleges and universities alone is 55,000,000 volumes, to cost $497,000,000 (Chart C, p. 20).

President Johnson noted, in his educational message to Congress, on January 12, 1955, which led to the enactment of an Educational Act that year, that 70% of *public* elementary schools had no libraries.

The problem is aggravated by the rising costs of library materials. For example, data from R. R. Bowker & Co., N. Y., showed an increase in the average cost of a *law book* from $7.59 in 1961 to $9.96 in 1964; and in the average cost of a *law periodical* from $6.28 to $7.27 for the same period. Art, technical, medical, etc. books rose likewise during such period.

The above 1965 ALA library inventory Report (Table 3, p. 22) shows that, whereas the Index of Serial Services, by category, 1961-1964, for such combined services rose from 39.80 (1957-59) to 54.93 (1964), the index for *law* rose from 28.46 to 46.21 for the same period.

The above 1965 ALA elementary and secondary school library inventory Report (pp. 26-28) estimates it will take 12½ years, at the 1964 rate of expenditures, to fill the gap in the *public* schools served by centralized libraries.[1]

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[1] The Number and Percentage of Public and Non-public School Pupils With, and Without, Centralized School Libraries, in 50 states and District of Columbia:

No. Pupils		% With	% Without
Public Schools	36,092,998	71.7%	28.3%
Non-public Schools	5,116,411	62.8%	37.2%
14,020 non-public school plants		55.4%	44.6%

Of 1900 some colleges and universities, only 129 have libraries with 300,000 or more volumes, for a total of 118,662,145 volumes. 1355 colleges have libraries of less than 300,000 volumes, and 1084 of these colleges do not meet ALA library standards. Of 591 junior colleges, 537 do not meet ALA library standards.

Will governmental local and state officials, as the trend toward state control of law school libraries grows, be more inclined to slant instruction in law to suit their predelictions or ends? If so, the technique provided by the case at bar may permit many politicians to "take-over" *private* law school libraries, especially those which may lack the means to defend themselves adequately in the law courts. Similarly, the pressure to fill the gap in libraries in the *publicly* owned schools at various levels may induce politicians to use the Cook County technique to take *private* school libraries at various levels under *cy pres* as a substitute for condemnation. We may witness growing socialization, in this manner, of the libraries of many *private* institutions, unless this Court will preserve and protect *such private* property.

Even Chief Justice Richardson's opinion holding *Dartmouth College* a public or civil corporation, prefaced it with this statement (1 N.H. 111, 114):

> ". . . if a *private* right be thus infringed today, and that infringement be sanctioned by a judicial decision tomorrow, there will be next day a precedent for the violation of the rights of every man in the community; and so long as that precedent is followed, the constitution will be, in fact, to a certain extent repealed."

DARTMOUTH COLLEGE CONTROLS THIS CASE.

The argument of the appellees followed the main line of the N.H. defense against the action of trover brought by the trustees of Dartmouth College. This Court discredited it in crushing separate opinions.

Although a much more complicated case, the *Dartmouth College* factual pattern bears strong similarity to the case at bar: (1) It had political overtones (4 Beveridge, *Life of John Marshall*, ch. v, The Dartmouth College Case, pp. 226-231) as did the case at bar (Abs. 66, third and fourth pars. from top) which motivated the introduction of the amendatory acts in the New Hampshire and Illinois legislatures; (2) These acts sought to remodel the respective corporations on the ground that they were public corporations and hence, it was argued, their charters were not "contracts" within the meaning of the contract clause of the U. S. Constitution, and so no constitutionally federally protected rights were infringed by those acts, and others implementing them.

The appellees have harped constantly on the theory that, upon a fair construction of its charter, originally and as amended, the Institute was an educational, and hence a charitable, corporation without stating if it was a private, or a public, charitable corporation. They realize fully that *Dartmouth College,* which was held to be a private corporation and its property private, although it was a private charity available to a select group only, would defeat the application for equity *cy pres,* or, if

they argued the Institute to be a public charitable corporation whose benefits were available to all residents of the City of Chicago and the County of Cook (regardless of their inability to pay the $100 application fee and the annual assessments), they would be defeated for lack of capacity to sue, since legal title to public property is held by the State, for the people as beneficiaries, and the State alone may legally file an application for *cy pres* (if there is a threat of the total loss or dissipation of that public property), to protect that public property and must control the litigation, according to the decisions in Illinois (*Smith* v. *Thompson,* 266 Ill. App. 165; *Kerner, Atty. Gen.* v. *Thompson,* 293 Ill. App. 454; *Courtney* v. *Wilson,* 327 Ill. App. 231, 243; *National Sculpture* v. *Art Inst.,* 9 Ill. App. (2) 473 (1956); *Wesley Greene* v. *Art Inst.,* 16 Ill. App. (2) 85, 90 (1958); *Newberry* v. *Blatchford,* 106 Ill. 586, 596-97; and *Peo.* v. *Braucher,* 258 Ill. 604) and most jurisdictions (*Jackson* v. *Phillips,* 96 Mass. 539, 578 (1867), opinion by later Mr. Justice Gray of this Court) which was not done in the case at bar.

Webster's extended argument (pages 551-600) for the trustees of Dartmouth College was adopted virtually by the members of the Court, except Mr. Justice Duvall. Posing the general question whether the N.H. Acts were valid and binding on its trustees, without their acceptance or consent, and reciting the facts chronologically at pages 552-554, he concluded, at pages 555-557:

> ". . . if it be contended that the effect of these acts was not *entirely* to abolish the old corporation, yet it is manifest that they impair and invade the rights, property and powers of the trustees, under the charter, as a corporation, and the legal rights, privileges, and immunities which belong to them as indi-

vidual members of the corporation. . . . If, either as a corporation, or as individuals, they have any legal rights, this forcible intrusion (the modern phrase is "muscling in") of others violates those rights, as manifestly as an entire and complete ouster and dispossession. These acts alter the whole constitution of the corporation; they affect the rights of the whole body, as a corporation, and the rights of the individuals who compose it; they revoke corporate powers and franchises; they alienate and transfer the property of the college to other (specifying in what particulars) . . . the argument on which these acts have been hitherto defended goes altogether on the ground that this is such a corporation, as the legislature may abolish at pleasure, and *that its members have no rights, liberties, franchises, property or privileges, which the Legislature may not revoke, annul, alienate or transfer to others, whenever it sees fit,*" (italics supplied)

In the case at bar, the 1963 amendment to the County Law Libraries Act (Appendix F-3, p. 41a) does not make reference, of course, specifically to the alleged Cook County-Institute deal on December 10, 1962 (p. 18 this Statement), but it followed the earlier Cook County ordinance of December 11, 1962 almost literally, confined it to Illinois counties of over 500,000 population under which Cook County alone could qualify, and was intended to qualify (Abs. 68) and made the Act effective upon the Cook County Board's implementary ordinance of September 30, 1963, notifying the Cook County Clerk that it desired to start a law library. The 1963 amendment, in effect, incorporated by reference almost the prearranged scheme to accept the Institute's library, if donated voluntarily, or to seize it by colorable court action, if the Institute members refused, and diminished the Institute's 15

man Executive Committee to 9 members on the Cook County Library Advisory Board, on which 6 Institute Board members would continue to serve, with 2 members appointed on recommendation of the Cook County Judges, members of the Cook County Advisory Board appointed thereto by Cook County, and the 9th being the Deputy Court Commissioner of Cook County. The Institute's members could no longer elect their Executive Committee and the Executive Committee could no longer fill vacancies. Cook County was vested with such powers.

Webster argued, at pages 558-561, citing *Calder* v. *Bull*, 3 Dall. 386 (April Term, 1798), that it is not the exercise of a legislative power, if the object and effect is to take away from one rights, property and franchises, and grant them to another. After citing authorities, he concluded, at p. 561:

> "It cannot be pretended that the legislature, as successor to the king in this part of his prerogative, has any power to revoke, vacate or alter this charter. If, therefore, the legislature has not this power, by any specific grant contained in the constitution; nor as included in its ordinary legislative powers; nor by reason of its succession to the prerogatives of the crown in this particular, on what ground would the authority to pass these acts rest, *even if there were no special prohibitory clauses in the constitution, and the bill of rights?*" (italics supplied).

Webster then, analyzing the Dartmouth College charter, distinguished between public, business and eleemosynary corporations, according to 1 Bl. Com. 471, at pages 563 and 569:

> *"They are founded by private persons, and on private property. The public cannot be charitable in*

these institutions. It is not the money of the public, but of private persons, which is dispensed. It may be public, that is, general, in its uses and advantages; and the state may very laudably add contributions of its own to the funds; *but it is still private in the tenure of the property,* and in the right of administering funds."

and at pages 571-2 (Note how closely Mr. Justice Story's opinion at 698, middle of page, to 701 follows and expands this):

"*It makes no difference that this property is to be holden and administered, and these franchises exercised for the purpose of diffusing learning.* No principle and no case establishes any such distinction. The public may be benefited by the use of this property; but this does not change the nature of the property, or the rights of the owners. *The object of the charter may be public good; so it is in all other corporations;* and this would as well justify the resumption or violation of the grant as in any other case as in this. In the case of an advowson, the use is public, and *the right cannot be turned to any private benefit or emolument.* It is, nevertheless, a legal private right, and the property of the owner, as emphatically as a freehold. The rights and privileges of trustees, visitors or governors of incorporated colleges stand on the same foundation. They are so considered, both by Lord Holt and Lord Hardwicke. *Phillips* v. *Bury; Green* v. *Rutherford.* See also 2 Bl. Com. 21.

"*To contend that the rights of the plaintiffs may be taken away, because they derive from them NO PECUNIARY* benefit, or private emolument, or because they cannot be transmitted to their heirs, or would not be assets to pay their debts takes an expressly narrow view of the subject. . . . It cannot be necessary to say more in refutation of the idea

> that there cannot be a legal interest, or ownership in anything which does not yield a pecuniary profit, as if the law regarded no rights but the rights of money, or of visible tangible property (as the right to vote, in which no voter has a particular personal interest, but which he may exercise at his own discretion). The exercise of this right directly and very materially affects the public much more so than the exercise of the privileges of a trustee of this college —1 or a few votes may be decisive. *Yet the public might not take away the right of suffrage or impair it.*"

In the case at bar under the Institute's charter and by-laws (Abs. 12, sec. 3 of charter; 31, sec. 17) the certificates, representing whatever interest each member may have in the Institute, have, both before and after the 1907 amendments, and since 1858, been bought, sold, bequeathed, and inherited.

Mr. Justice Washington made an independent approach, in discussing the nature of the contract created by the grant of a charter, spelling out the State's obligations not to reassert the right to grant the franchise to another, not to impair it (p. 658), adding:

> "There is also an implied contract that the founder of a private charity, or his heirs, or other persons appointed by him for that purpose, shall have the right to visit, and to govern the corporation, of which he is the acknowledged founder and patron, *and also that, in case of its dissolution, the reversionary right of the founder to the property, with which he had endowed, should be preserved inviolate.*" (italics supplied).

Mr. Chief Justice Marshall stated (p. 630) that all parties agreed that the nature of the corporation must be

determined from a construction of the charter (Abs. 138), and concluded that the charter created a private corporation, prefacing his analysis of the State's contract with the perficient founders (p. 630 to bottom of page), 633-634, and 638:

> "Those who are no longer interested in the property may yet retain such an interest in the preservation of their own arrangements, as to have a right to insist that those arrangements should be held sacred. Or, if they themselves have disappeared, it becomes a subject of serious and anxious inquiry, whether *those to whom they have legally empowered to represent them forever* (the Institute charter says they are their associates and successors) *may not assert all the rights which they possessed while in being.*
>
> . . .
>
> "Dartmouth College is really endowed by private individuals who have bestowed their funds for the propagation of the Christian religion among the Indians, and for the promotion of piety and learning generally. . . . From these funds, the salaries of the tutors are drawn; and these salaries lessen the expense of education to the students. It is, then, an eleemosynary (1 Bl. Com. 471) corporation *and, so far as respects its funds, a private corporation.* . . .
>
> "The character of civil institutions grows out of the manner they are formed and the objects therefor, and not out of their incorporation. The same institutions, created for the same objects, though not incorporated, would be public institutions, and, of course, be controllable by the legislature. The incorporating act neither gives, nor prevents, this control. *Neither, in reason, can the incorporating act change the character of a private eleemosynary institution.*"

Mr. Justice Story, at the bottom of page 671, added to this:

> "When a corporation is said, at the bar, to be public, it is not merely meant that the *whole* community may be the proper objects of the bounty, but that the government have the sole right, as trustees of the public interests, to regulate, control and direct the corporation, and its funds and franchises, at its own good will and pleasure. Now such an authority does not exist in the government, except where the corporation is, in the strictest sense, public; that is where its *whole* interests and franchises are the *exclusive* property and domain of the government itself."

Indeed, N. H. admitted (p. 602) if a charter creates artificial persons, for private purposes, the corporation is private, but it argued that the education of youth and the encouragement of the arts and sciences is one of the most important objects of civil government, a governmental function, to carry on which the charter was granted, and so Dartmouth College was a public corporation, and its charter was not a contract protected by the contract clause of the U. S. Constitution.

Chief Justice Richardson, in 1 N.H. at 115-117 defined both kinds of corporations, but held the College was not formed for the benefit of the incorporators, as would be true of library corporations (p. 124-5):

> "In the case of corporations, where all the benefit derived from them consists in the privileges incident to membership, *as in incorporated library companies*, it may be otherwise. But in the property of *public* corporations, there is no private beneficial interest that can be divested."

Proceeding from colleges to professional organizations, taking a cue from Chief Judge Richardson, investigation reveals they have been held in England to be for MUTUAL

benefit and hence private, and henee devises to them forever have been held to violate the Mortmain Act and the Rule against Perpetuities: In *Carne* v. *Long*, 2 DeG, F&J 75, 79 (63 Engl. Ch., 1860); In re *Clark's Trust*, L.R. 1 Ch. Div. 497, 500; *Brown* v. *Dale*, L.R. 9 Ch. Div. 78; *In re Dutton's Will*, 4 Exch. Div. L.R. 54, 57; *In re Pervost* v. *Barclay's Bank*, 2 Ch. Div. L.R. 383, 387-88; *Society of Writers*, 14 A.C. (Court of Sessions) 34, 2 Tax Cas. 257; Forrests' Case, 15 A.C. 334, 3 Tax Case. 117, wherein the Civil Engineers Society was compared by Lord Watson to the Inns of Court and the Faculty of Advocates in Scotland; *Young* v. *Bristol*, K.B. Div. 718, L.R. (1944).

In the United States, the best summary of the nature of such organizations, including libraries, is to be found in Scott, *Trusts* (2d ed.), sec. 376, at pp. 2727-28:

> "Where a trust inures to the benefit of private individuals, although the benefits are not pecuniary, the trust is not charitable. . . . *A trust for the benefit of a library privately owned by a group of individuals and conducted for the benefit of the owners is NOT a charitable trust.*"

SUMMATION.

Wheelock's private funds started Dartmouth College. Hence it was a private corporation, tho it later received land from New Hampshire and Vermont. The Chicago Law Institute was founded by the exchange of law books for stock therein. It has not since received a dime from the City, State or County. It was created for the self-improvement and direct mutual benefit to its members

socially, intellectually, and professionally on a severely restricted basis. It is not even a private charity!

The case at bar was quite well summarized by Mr. Justice Story, at pages 668-69:

> "If, therefore, the foundation be private, though under the charter of the government, the corporation is private, however extensive the uses may be to which it is devoted, either by the bounty of the founder, or the nature and objects of the institution. . . . This is the unequivocal doctrine of the authorities; and cannot be shaken but by undermining the most solid foundations of the common law. *Philips* v. *Bury*, 1 Ld. Ray. 5, 9. . . .
>
> "It was, indeed, supposed at the argument that if the uses of an eleemosynary corporation be for *general* charity, this alone would constitute it a public corporation. But the law is certainly not so. To be sure, in a certain sense, every charity which is extensive in its reach, may be called a *public* charity, in contradistinction to a charity embracing but a few definite objects. . . . So it would be, if the endowment, instead of being vested in a corporation, were assigned to a private trustee; yet, in such case, no one would imagine that the trust ceased to be private, or the funds became public property. That a mere act of incorporation will not change the charity from a private to a public one, is most distinctly asserted in the authorities. . . . The fact, then, that the charity is public is no proof that the corporation is also public; and, consequently, the argument, so far as it proceeds on this foundation, falls to the ground. If, indeed, the argument were correct, it would follow that almost every hospital and college would be a public corporation; a doctrine utterly irreconcilable with the whole current of decisions since the time of Lord Coke."

CONCLUSION.

Immersed in these disturbing perplexities, we submit that this case presents substantial federal questions which are of large social significance in the library world, and that they merit the fullest consideration by this Court.

Respectfully submitted,

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APPENDIX A

(Opinion of Judge O'Brien)

After carefully listening to extended arguments and careful study, the court is of the opinion that the real questions to be decided are questions of law.

The first question is: What is the legal status of the Chicago Law Institute? After having made that determination, the next question is: Does the (illegible) Petition apply?

The Chicago Law Institute was incorporated by special act of the Illinois Legislature in 1857. Section 2 of the original charter provides: "The object and intention of this incorporation is the library purposes, the collection of legal opinions, the arrangement of [illegible] the formation of a law library in the City of Chicago in the County of Cook." Section 3 provides, among other things, that the [illegible] and library shall be divided into shares which shall be deemed personal property.

Subsequent to this, on April 30, 1877, [illegible] charter was amended. Section 2 was amended to read as amended by adding, after the words "the object and intention of this corporation" the words "to act for [illegible] profit" and then adding, after the words "Library of Chicago", the words "to be maintained, [illegible] and carried on by the members of said corporation, and all shares of said corporation shall be considered as [illegible] and not real estate." (Emphasis added.)

The Illinois Legislature has passed a general [illegible] Corporation Act (Chap. 32, Sec. 157, Ill. Rev. Stat.) which has been revised and amended from time to time. Under the provisions of this statute